

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA .
vs. . H-09-CR-336-2
. HOUSTON, TEXAS
. JUNE 9, 2011
. 10:52 A.M.
MICHAEL N. SWETNAM, JR. .
.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

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General Order 94-15, United States District Court,
Southern District of Texas.

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FOR THE GOVERNMENT:

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Proceedings recorded by mechanical stenography, transcript
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1 A P P E A R A N C E S: (Continued)

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9 A P P E A R A N C E S: (Continued)

10 OFFICIAL COURT REPORTER:

11 Cheryll K. Barron, CSR, CM, FCRR
12 U.S. District Court
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P R O C E E D I N G S

2

THE COURT: Okay. Let's turn to the United States
versus Swetnam.

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10:52

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MR. COSTA: Gregg Costa for the United States. Good
morning, your Honor.

6

THE COURT: Good morning.

7

MR. COSTA: I'm also joined by Kristine Rollinson,
from our office, who is handling the forfeiture aspect.

9

THE COURT: I know Ms. Rollinson from years ago.

10:53

10

Welcome.

11

MS. ROLLINSON: Thank you.

12

MR. CLARK: Good morning, your Honor. Michael Clark
and Sheldon Weisfeld for Mr. Swetnam.

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10:53

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THE COURT: Mr. Weisfeld is someone else I've known
for a long time. Welcome to all of you.

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MR. WEISFELD: Good morning, your Honor. Good to see
you.

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THE COURT: You returned to good health?

19

10:53

20

MR. WEISFELD: Yes, thank God, your Honor. No more
health issues. I think it was just a situation of stress; and
I, you know, haven't had any more re-occurrences, thank God.

21

22

THE COURT: Health problems put every other problem in
perspective, I think.

23

24

MR. WEISFELD: Without a doubt, your Honor.

10:53

25

THE COURT: Good morning, Mr. Swetnam.

10:53 1 THE DEFENDANT: Good morning, your Honor.

2 THE COURT: All right. Of course, I remember this
3 case well. I have reviewed --

4 THE PROBATION OFFICER: Good morning, your Honor.
10:54 5 Hugo Renteria with probation, your Honor.

6 THE COURT: Thank you.

7 Okay. I've reviewed Mr. Renteria's report. Are
8 you -- have you reviewed it with your client, gentlemen?

9 MR. CLARK: We have, yes, your Honor.

10:54 10 MR. WEISFELD: Yes, your Honor.

11 THE COURT: Which of you would like to speak first?
12 I'll make time for all of you, of course.

13 MR. CLARK: Your Honor, I will speak to the objections
14 to the PSR and to the government's responses and probation
10:54 15 officer's responses if I could.

16 THE COURT: Yes, sir.

17 MR. CLARK: We were given a copy of the probation
18 officer's responses, and we understand the position that he's
19 taken. Let me start with, I guess, the last position that he's
10:54 20 taken, which I think is just erroneous.

21 He indicates that because the government hasn't
22 moved for a 5K that a downward departure is not in order. And
23 we agree in principle with that. But we're not talking about a
24 downward departure.

10:54 25 We're talking about a variance sentence. And to

1 the extent that the Booker and the Blakely and those cases have
2 come down, it's a totally different argument, your Honor.

3 THE COURT: Okay. I didn't know what 5K was doing in
4 the mix. Okay. Very well.

5 MR. CLARK: So, we have set out our positions in our
6 objections to the PSR, which we're happy to go through with the
7 Court. And I just don't want to be redundant, Judge. We've
8 set out why we think that we're right and why we think that
9 these adjustments are not appropriate as to the abuse of a
10 position of trust.

11 THE COURT: Okay.

12 MR. CLARK: And --

13 THE COURT: Well, I do have your writings. If there's
14 anything you would like to add to that, that's fine.

15 MR. CLARK: No. Again, I think it would be redundant.

16 The Court would be within it's province to find
17 that the position of trust enhancement is not appropriate. And
18 we would ask the Court to find --

19 THE COURT: Are you saying that it can't be
20 appropriate in any position between -- any tandem between the
21 insurance broker and a client or are you saying in this
22 particular case it does not meet that threshold?

23 MR. CLARK: I think in this particular case, is our
24 position, given the factual scenario. I'm not saying
25 categorically, no. I think that's what the Eleventh Circuit is

1 basically pointing out, that -- it's a fact determinant type of
2 analysis, your Honor.

3 And, as you recall, the facts in this case were
4 such that, you know, clearly he's not fiduciary. Under the law
5 he's not a fiduciary. So then you go to the question of
6 position of trust. And here, he was exercising a close,
7 ongoing relationship. There's no doubt about that.

8 But the other facts were that the hospital was
9 looking at the insurance policies and getting input from other
10 people.

11 And, again, it's a fact issue. The Court can go
12 either way. We realize that. But we think that in this case
13 that it's not an appropriate adjustment. That's our position.

14 As to the automatic two-point denial of
15 acceptance of responsibility, again, I think that our position
16 is that the commentary accompanying that particular guideline's
17 provision says that if the defendant is putting the government
18 to its proof ordinarily acceptance of responsibility is not
19 appropriate, unless there are questions of law that are being
20 litigated. And the defendant in this case actually litigated
21 those questions of law.

22 We understand that the jury has spoken. We
23 understand that the record has to be viewed, but -- we're not
24 trying to re-litigate the case, your Honor. But we did, in
25 good faith, take positions of law as to him being an authorized

1 agent and --

2 THE COURT: But in terms of his acceptance of
3 responsibility, how do we square what you've said with the fact
4 he's apparently suing the hospital? I mean --

5 MR. CLARK: Well, that's -- he's suing the hospital in
6 the name of the government, by the way. He's suing the
7 hospital as a qui tam relator, claiming that the hospital stole
8 money from the federal government program Medicare by
9 essentially -- it's the anti-kickback and Stark violations,
10 your Honor, that he's alleging that they have basically tainted
11 claims that go back to inducing all these physicians, which the
12 law prohibits.

13 And, so, as pointed out, you know, he has
14 basically brought to the attention of the United States and
15 then filed this lawsuit in the name of the federal government
16 under the False Claims Act. As you know, billions of dollars
17 have been recovered in cases of this nature. So, it's not
18 related -- as Mr. Lewis points out in his letter to the Court,
19 that Sweezy case is not related to this case and that's -- I
20 think we have supplied to the Court the qui tam action.

21 It's an ironic situation that he is essentially
22 bringing this lawsuit against the purported victim in this
23 case. I think it's apples and oranges, Judge.

24 THE COURT: Okay.

25 MR. CLARK: And unless there's other questions --

1 THE COURT: No. Let me -- do you want to say
2 anything?

3 MR. WEISFELD: I do, your Honor.

4 Regarding the position of trust, your Honor,
5 there really is -- I think if you remember, there's a layer
6 here. Smith Reagan, David Smith and Joe Reagan, were the ones
7 that dealt with the hospital. He, in his position as a
8 reinsurance agent, didn't have direct relationship with the
9 hospital. And I think that was an element that may not have
10 been explained that I believe that now your Honor understands.

11 How can he have a position of trust? He doesn't
12 deal directly with the hospital. That wasn't his position.

13 And, in addition, your Honor, Frank Crystal
14 Company in 2005 received \$87,000 from the hospital, analyzing
15 their insurance policies. In 2006 Marsh McLennan received
16 \$257,000 aiding the hospital, analyzing their insurance. And
17 in 2007 Alliant, Lorriane Lewis, their representative, had
18 received over \$300,000.

19 I would say, how could he have that position of
20 trust, your Honor, if they -- this is not a -- this isn't a --
21 this is an experienced, qualified company that had eight
22 representatives in between their insurance providers and
23 themselves. That's why I believe that the position of trust
24 is -- should not be applicable in this situation.

25 THE COURT: Okay. All right.

11:01 1 MR. WEISFELD: In addition, your Honor, I think the
2 issue about the qui tam, the civil lawyers that were
3 representing him in the civil suit were the ones that, by
4 analyzing the case, they saw that the hospital had a
11:01 5 relationship with their doctors where no one else in that
6 community, no other hospital -- they locked down all the
7 doctors.

8 In addition, your Honor, the statement made by
9 Mr. Vela, saying that the qui tam claim was frivolous -- I sat
11:01 10 in on the hearing before Judge Hannan, and Judge Hannan found
11 that the case was viable. And the case is still --

12 THE COURT: Yeah, I saw that.

13 MR. WEISFELD: And I would think, your Honor, that --
14 I know Mr. Vela wasn't present; but I know that on the date
11:01 15 that he wrote that statement that he knew that this case wasn't
16 frivolous that Judge Hannan -- and I presented to your Honor
17 the first amended petition. I was present. It's being
18 pursued. The government may not be pursuing it now. They
19 passed it back, but there's two law firms that are continuing
11:02 20 to represent the claim of the government.

21 Your Honor, I've come to know this man very
22 dearly. The date of the trial, your Honor, I was coming with
23 his wife in the car.

24 THE COURT: I remember that.

11:02 25 MR. WEISFELD: And I -- I and my family owe a great

1 debt to him.

2 THE COURT: I understand that.

3 MR. WEISFELD: Mr. Lewis, who I've been on the other
4 side of for -- since I've been practicing law, I've known him
5 over 30 years -- would not have written this letter -- as
6 Mr. Clark said, he would not have written this letter as a 5K,
7 and that was the understanding with Mr. Costa. It was -- a US
8 Attorney found that his information was valid enough to pursue
9 a case against an individual. And if a United States -- the
10 person started trial, there was -- the judge decided that there
11 was a mistrial, and the defendant then plead guilty. That
12 person is serving 70 months in federal custody as well as
13 \$40 million that he's responsible for.

14 Your Honor, on the qui tam claim, I was present
15 when we were in Washington, DC. And there were five or six
16 government representatives there, including the local US
17 Attorney that was initially in charge of the case. They
18 surveyed the case; and, after their survey of the case, they
19 decided they were going to pursue it.

20 Just before reopening it, they decided they were
21 not going to pursue it. But after a hearing before Judge
22 Hannan, with civil attorneys representing the claims of the
23 government, Judge Hannan decided that the case was viable.

24 Your Honor, after 23 years of working with this
25 Valley Baptist Hospital, they had not one single claim, as

11:04 1 their insurance reinsurer, that Swetnam Insurance Services did
2 not completely take care of. In the year after Swetnam
3 Insurance is no longer their representative and Alliant and
4 Lorriane Lewis is their representative, they have a
11:04 5 30 million-dollar lawsuit pending against the insurance company
6 from after a storm that they're being -- they were not paid
7 for. So, it's -- I find it --

8 THE COURT: You're saying that his successor, then --

9 MR. WEISFELD: Dropped the ball.

11:05 10 THE COURT: -- did not provide the appropriate
11 coverage. All right.

12 MR. WEISFELD: Your Honor, if I ever see -- you know,
13 I've been practicing now it's 40 years -- that a variance would
14 be appropriate in a case, this is the one, your Honor.

11:05 15 THE COURT: Okay. Thank you very much.

16 Mr. Swetnam, do you wish to speak?

17 THE DEFENDANT: Yes, sir, I do.

18 THE COURT: Okay.

19 THE DEFENDANT: There has not been a single day that I
11:05 20 haven't regretted getting involved in this. And I'm sorry.
21 I'm sorry for my family, the pain that I've caused them.

22 Right now I'm close to completely financially
23 broke. And what's so sad is we begged the civil attorney to
24 reamend their suit so that we could get it covered under my
11:06 25 errors and omissions insurance. There was \$2 million available

11:06 1 to pay them, and they didn't want it. After begging them. I'm
2 sorry. That's all I can say.

3 THE COURT: Okay. Thank you very much.

4 Mr. Costa?

11:06 5 MR. COSTA: Your Honor, there's a number of issues I
6 think that have been raised that I want to address. I'll start
7 with the big picture and then address some of the specific
8 issues.

9 And I read all the submissions from the defense,
11:06 10 including some very nice letters from family and a minister. I
11 don't doubt for a second that Mr. Swetnam is a good family man,
12 he's been a good member of his community, he's been good to his
13 friends. But that doesn't distinguish him from 95 percent of
14 the people who come in here for sentencing as criminal
11:06 15 defendants. Most of them are good to their family. They're
16 good people generally. They just got involved in a bad
17 situation, like Mr. Swetnam.

18 What does distinguish Mr. Swetnam is that this
19 was not a crime of desperation. And so many of the defendants
11:07 20 who come into this court do so because they committed a crime
21 out of desperate situations.

22 THE COURT: That's true. That's true.

23 MR. COSTA: Maybe it's someone from Mexico or Central
24 America -- we just saw the prior sentencing -- who is illegally
11:07 25 re-entering the country because that's the only way they can

11:07 1 make a living for their family or maybe it's a young person who
2 is dealing drugs because in the community where he was raised
3 that's the only thing he see as a way to make any money.

4 Mr. Swetnam wasn't in that situation of
11:07 5 desperation. He was a respected businessman. He was making a
6 very good income. He had everything going for him; and, yet,
7 he still found the need to defraud people who had been not just
8 business -- he had a business relationship with but people that
9 he was friends with and that he trusted and trusted him.

11:07 10 So, to me, it -- it's -- Mr. Swetnam is more
11 culpable because he didn't need to commit this crime out of any
12 desperation. Whether it was for greed or because he thought he
13 could outsmart people or a combination of both, I don't think
14 it helps him that -- you know, they're trying to say, "Oh, he's
11:08 15 given up his insurance license," all these other things. It
16 shouldn't benefit him he was a successful business person. In
17 my mind, that makes it less understandable why he commits this
18 offense.

19 There are a few other factors that I think are
11:08 20 relevant when you look at the nature and circumstances of the
21 offense. The first is that this was not an impulsive action.
22 It went on over a couple of years. It took a lot of planning,
23 forging documents, creating fake documents. It was a
24 deliberate, planned crime.

11:08 25 Secondly, it was an abuse of trust. And I'll

11:08 1 talk about that more in a second. But I think it was clearly
2 one of the more egregious cases of abuse of trust that I've
3 seen, given his long-standing relationship and the fact that he
4 made -- legitimately made a lot of money from the hospital over
11:08 5 a number of years and then decided to abuse that relationship
6 and defraud a non-profit hospital of millions of dollars.

7 And, third, is the fact that the loss is
8 approximately \$4 million, the economic loss.

9 But I think that actually understates the
11:09 10 potential harm or the magnitude of Mr. Swetnam's crime because,
11 for two years, he -- the hospital did not have this windstorm
12 coverage at the higher layers. So, probation, rightly so, is
13 holding him responsible for the money the hospital paid for
14 those non-existent policies. But the real threat from
11:09 15 Mr. Swetnam's crime is that if a storm had hit during one of
16 those two years, a severe storm had hit, the hospital could
17 have gone under because they wouldn't have had any coverage.

18 The next year, a storm did hit. I know
19 Mr. Weisfeld is saying there's some dispute over coverage, as
11:09 20 often happens, as the Court knows, when you have large
21 insurance claims. But at least there was a policy. If that
22 had hit when Mr. Swetnam was there, who knows what could happen
23 to this hospital that provides all kinds of services to a
24 mostly poor Medicare and Medicaid community.

11:09 25 So, we do think the guideline range is reasonable

11:09 1 and the probation recommendation of 70 months is a reasonable
2 and necessary sentence to account for the nature of this crime
3 and to deter others who are in a position like Mr. Swetnam, who
4 are successful but who see because of a relationship they've
11:10 5 developed that they have the opportunity to defraud someone. I
6 think it is important to send that message.

7 THE COURT: How about the argument that acceptance of
8 responsibility ought to be awarded because defendant could
9 reasonably have believed that there were open questions of law?

11:10 10 MR. COSTA: It's not a case -- the guidelines state if
11 someone is challenging the constitutionality of a statute.
12 That's not occurring. The issue is, was -- was his conduct
13 fraud. That's at its heart, a fact issue: Did he have the
14 intent to deceive the hospital? He says no. He still says,
11:10 15 no, that he wasn't deceiving the hospital. The jury said yes.
16 And I think the Court can make its own determination of what it
17 thinks of the evidence. But he's clearly selling non-existent
18 policies.

19 To me, it's such a blatant fraud, the fact that
11:11 20 he's continuing to deny that and say there's some legitimacy to
21 selling policies that were just made up, companies didn't exist
22 and make them up from an offshore entity, I don't think they
23 even have a close argument on acceptance.

24 I do want to talk about their argument, the qui
11:11 25 tam and the Sweezy case. And I want to clarify some things on

1 the qui tam. Mr. Swetnam, for a number of years, administered
2 this insurance program that he now alleges was an illegal
3 kickback.

4 The United States --

5 MR. WEISFELD: Your Honor, we would object. The qui
6 tam --

7 THE DEFENDANT: That's not true.

8 MR. WEISFELD: Pardon me.

9 The qui tam claim is being handled in a different
10 court. I beg to differ with Mr. Costa on the issue that he
11 either developed it or that he ran that. I beg to differ, and
12 I think that's a rabbit trail that he's trying to take you
13 down.

14 THE COURT: Well, whether or not it is, I allowed you
15 to speak --

16 MR. WEISFELD: That's fine.

17 THE COURT: -- of the qui tam, and we're going to
18 allow Mr. Costa to do likewise.

19 MR. COSTA: Thank you, your Honor.

20 And let me say, your Honor, I didn't say he
21 developed or devised it. I said he helped run it after it was
22 created. That information comes from Andrew Bobb, who was the
23 AUSA in our civil section who reviewed whether the United
24 States should intervene.

25 THE COURT: Yeah, I knew Mr. Bobb. Is he still with

1 your office?

2 MR. COSTA: Yes. Yes. He does mostly these qui tams.
3 I spoke to him a few days ago. I didn't want to be involved in
4 obviously anything in terms of the evaluation of whether the
5 government should intervene. But after the decision was made
6 and given the sentencing and the issues they raised, I called
7 Mr. Bobb this week and just said, "What was Mr. Swetnam's
8 involvement?"

9 And he did say he -- he didn't create it but he
10 was involved in administering it. And that's how he knew about
11 it. Whistleblowers typically are involved. That's how you
12 become a whistleblower. So, I don't think that's any --
13 negates the fraud.

14 So, he knows about this for a number of years.
15 He only files the lawsuit after the hospital fires him and
16 files a civil suit over the issues that gave rise to this
17 criminal case. So, he wasn't riding in on his white horse
18 before anything else happened. I mean, it was retaliatory. He
19 only did it after the hospital fired him and then it made these
20 allegations of fraud against him.

21 And the third thing I'd say about the qui tam, my
22 understanding is all Judge Hannan did was deny a Rule 12(b)(6).
23 I mean, the Court is familiar with those standards. That
24 doesn't means Judge Hannan is saying there was a fraud here or
25 not. I mean, he was just saying it's not to be dismissed at

1 that preliminary stage.

2 If he's successful -- I don't know whether he
3 will be or not, because the United States decided not to
4 intervene. If he's successful, he's going to get a huge
5 bounty. I mean, there's a reward in and of itself from qui tam
6 cases that -- like Mr. Clark said, it can be tens of millions
7 of dollars. So, that's his reward. If that's a successful
8 case, he will get his cut of the verdict, or the settlement, in
9 that case. I don't think it in any way should benefit him in
10 an unrelated criminal case.

11 They also talk about his involvement in the
12 Sweezy case. He did help the government. You have the letter
13 from Mr. Louis.

14 THE COURT: I do.

15 MR. COSTA: That was all before this case started.
16 Defendants do all kinds of good deeds. They contribute to
17 charities, some of them have served in the military.
18 Defendants do all types of good deeds before their criminal
19 case, that typically don't benefit them. So, I don't see why
20 the fact that he testified truthfully in a case -- unrelated
21 case for the government, before this case ever arose, should
22 reduce his sentencing range or be an argument for a lower
23 sentence.

24 Part of -- when people get 5K's for substantially
25 assisting the government, part of that is because they,

11:14 1 themselves, have to accept their own -- accept responsibility
2 for what they did; and then, the other part, is that they
3 helped the government prosecute others. I don't think he's
4 done either half, but he certainly hasn't done the first half.

11:14 5 And I actually gave Mr. Swetnam what I think is a
6 very rare and generous offer. Even after he was convicted at
7 trial, I gave him the opportunity to cooperate against others
8 who were involved in this scheme. He chose not to. Perfectly
9 his right. He shouldn't be punished in any way for making that
11:15 10 decision.

11 But I think that is relevant to whether he should
12 get a reduction for cooperating with the government when he has
13 specifically refused my request. I don't think most
14 prosecutors would allow someone who went to trial to then still
11:15 15 cooperate. He refused that request.

16 The final thing I would comment on is the abuse
17 of trust if the Court --

18 THE COURT: Yeah, I would like to hear more about
19 that.

11:15 20 MR. COSTA: Mr. Swetnam's position as an insurance
21 broker is what enabled him to commit this crime. The hospital
22 trusted him to negotiate their policies; they trusted him to
23 receive the policies from the insurers and transmit them to the
24 hospital; and they trusted him to bill them and then he would
11:15 25 transmit the hospital's payments to the insurance companies.

1 All three of those trusted relationships he utilized to commit
2 the crime, both the Zurich crime of inflating the premiums by
3 altering those policy documents and the windstorm policy that
4 he created and passed on to the hospital.

5 He had a 20-year relationship with the hospital.
6 I disagree with this -- that he had no interaction with them.
7 Mr. Cook's testimony is clear that Mr. Swetnam would call
8 Mr. Cook, who was in charge of insurance at the hospital. They
9 would -- and Mr. Swetnam would tell him what prices he was able
10 to obtain in New York.

11 He actually got Mr. Cook his job at the hospital.
12 He was dealing with Valley Baptist before Mr. Cook ever worked
13 there. And Mr. Swetnam said, "Oh, why don't you interview with
14 them? I can help you get a job there," in the late Eighties.
15 So, he had a strong, strong relationship of trust with
16 Mr. Cook.

17 You asked Mr. Clark if he was saying it's always
18 true that a broker could never be an abuse of trust situation
19 or if it's just this case. And I think it is a fact based
20 determination. It might not always be the case. But if there
21 is a case where a broker had a trust relationship with their
22 client, I think this is it, given the over 20 years of
23 dealing -- and it's a small community.

24 I would point to the Fifth Circuit case from a
25 few years ago that found a mortgage broker was in a trust

1 relationship with a mortgage lender whom they submitted the
2 lending documents to. I mean, this is a much greater trust --
3 stronger trust relationship. He had a lot of personal contact
4 with the hospital. It's a much higher dollar account than a
5 typical mortgage application.

6 And the way those mortgage brokers work, I mean,
7 they're dealing with all kinds of lenders. They're dealing
8 with a large, large number of applications. Here, this was a
9 multimillion dollar client. There was a strong personal
10 relationship. And the Fifth Circuit, in that case, said it
11 was -- that the fact that the lenders had in some way relied on
12 the lender -- I'm sorry -- the broker to submit reliable
13 information supported application of the enhancement.

14 Well, here, I think there was a great deal of
15 trust that Mr. Swetnam was transmitting legitimate documents,
16 was sending bills that reflected the real prices and, most of
17 all, was submitting policies that did in fact exist. So, I
18 think it's a stronger factual scenario for application of the
19 enhancement than existed in that mortgage situation or in other
20 cases I cited.

21 THE COURT: Thank you very much.

22 Mr. Renteria?

23 THE PROBATION OFFICER: Good morning, your Honor.

24 THE COURT: Good morning.

25 THE PROBATION OFFICER: With respect to the issues

11:18 1 that are -- objections that were noted by defense counsel, the
2 probation office maintains its position as noted in the
3 addendum with regards to the issue of abuse of trust and the
4 enhancement on acceptance of responsibility. With regards to
11:18 5 the recommendation, we have nothing further to add than what's
6 stated on our recommendation.

7 THE COURT: Thank you.

8 Gentlemen, anything further?

9 MR. WEISFELD: Your Honor, I believe that Smith
11:18 10 Reagan, which was the company that dealt with the board of
11 directors --

12 THE COURT: Yes, sir.

13 MR. WEISFELD: -- no charges. They had a civil
14 settlement of \$1.2 million. I tender to Mr. Costa, there
11:19 15 was -- during the civil suit --

16 THE COURT: Do I have whatever you tendered to him?

17 MR. WEISFELD: No, not yet. I was going to let him
18 read it first, your Honor.

19 THE COURT: Okay.

11:19 20 MR. WEISFELD: Mr. Scott Lieberenz had a deposition
21 during the trial -- during the deposition, [sic] on the civil
22 case. And his deposition said that he felt that Mr. Swetnam's
23 responsibility was less than \$1.5 million. So, that would be
24 the argument.

11:19 25 We would tender for, your Honor, the cover

1 sheet --

2 THE COURT: Give it to Ms. Loewe, if you would.

3 MR. WEISFELD: I apologize.

4 On Page 49, your Honor, of the deposition.

5 THE COURT: And the gentleman's name, for the court
6 reporter, is spelled L-I-E-B-E-R-E-N-Z.

7 MR. WEISFELD: Your Honor, Mr. Lieberenz --

8 THE COURT: Let me absorb this first.

9 MR. WEISFELD: Yes, your Honor.

10 THE COURT: Okay.

11 MR. WEISFELD: And he is the CFO for the company, your
12 Honor, for The Valley Baptist. And that's -- would be the
13 argument, is if the hospital is out, that that was their own
14 CFO making that statement.

15 Your Honor, if Smith and Reagan weren't charged,
16 it would seem to be, your Honor -- if there was an error in the
17 policy, it would make sense that they would approach
18 Mr. Swetnam with a letter saying there's a problem. That's how
19 most civil case -- most claims are initially handled. There
20 never was -- Mr. Lieberenz acknowledges in his deposition,
21 there never was a letter sent.

22 It just, your Honor, it was an error. There was
23 an error in the Landmark case that David Smith issued. There
24 was coverage, your Honor. The hospital would have been --
25 there's the E & O coverage that I sent to your Honor that I

11:21 1 also -- I also gave to Mr. Costa. There was a policy that
2 covered the time certain from -- covering Swetnam Insurance
3 up -- Michael N. Swetnam doing business as Swetnam Insurance
4 Services, during the period of time, that would have covered a
11:21 5 claim of \$2 million.

6 You have a letter from the civil attorney Joel
7 Resendez. I was present, your Honor, when we spoke to
8 Mr. Hanslik, when we spoke to Trey Martinez. If it's about
9 money, here's the money. The money was there.

11:22 10 Your Honor, I just don't understand --
11 Mr. Springfield, who was the CEO of this hospital, had a
12 personal interest in getting the things done the way my client
13 did for him. Mr. Carter on the 2006 policy -- I beg to differ
14 with the \$30 million of Mr. Costa's claim that the hospital --
11:22 15 if they had had -- there were hurricanes before. The problem
16 was -- the basic coverage is where the problem was with
17 Alliant. The basic coverage, they didn't have.

18 We're talking about the top coverage, your Honor.
19 We're talking about it's a layered.

11:23 20 THE COURT: I understand. I understand layers.

21 MR. WEISFELD: It would have never -- this was done to
22 protect their bond ratings, your Honor. That's the reason the
23 policy -- it would have cost \$25 million --

24 THE COURT: Okay. I'm not certain what we're arguing
11:23 25 about now. Are we arguing about the basic issue of guilt or

1 are we arguing about something else?

2 MR. WEISFELD: No. We're -- we don't -- how guilt
3 occurred, what led up to the offense.

4 THE COURT: Okay. All right.

5 MR. WEISFELD: What led up to the offense was the
6 chairman of the executive board deciding -- the one running the
7 hospital -- decided that he needed the coverage because it
8 would cost \$25 million for that top percentage to get -- so
9 their bonds would stay at the proper rating. It falls apart.
10 He tries to sell it. It falls apart. That's why Mexico
11 occurs. That's the screw-up that he makes. That's the error
12 he makes.

13 The CEO got a \$2.5 million bonus that year.
14 Mr. Vela got almost a half a million dollars that year.

15 Everybody was eating at the trough, your Honor. He's the one
16 holding the bag.

17 This man deserves getting probation, your Honor.
18 You're never going to see this man again.

19 THE COURT: I do believe that. I do believe that.

20 MR. WEISFELD: And what purpose would it serve, like
21 you said about the young fellow before, us paying for somebody
22 like that? This man can get a job. There's a company that --

23 THE COURT: Well, there's something to that. He owes
24 an enormous amount on restitution.

25 MR. WEISFELD: An enormous amount on restitution.

1 THE COURT: And he needs to make a dent in that.
2 That's always a question in these restitution cases.

3 MR. WEISFELD: And that's where we would like to leave
4 your Honor.

5 You know, with all respect to Mr. Costa -- I
6 mean, I've come to know him, I've come to respect him. He's a
7 very, very adequate warrior.

8 THE COURT: No. He's better than that. But anyway,
9 come to your point.

10 MR. WEISFELD: Your Honor, I don't think this man
11 needs to go to prison. I don't know who would benefit for him
12 to go to prison.

13 THE COURT: Well, I know. I don't know that -- I
14 mean, I don't know who's benefiting from Bernie Madoff being in
15 prison. But can we have a system where you can get caught in a
16 financial misconduct, you just announce your shame and get no
17 time? I mean, that can't work, can it?

18 MR. WEISFELD: Your Honor, let him pay it back, let
19 him work to pay it back. What purpose will it serve? To what?
20 To Valley Baptist?

21 Valley Baptist has taken Medicare for \$2 billion.
22 Let's see -- let's see -- okay. Mr. Costa's is laughing.
23 That's what the claim is. Let's see what the settlement is.

24 THE COURT: Okay. Well, Mr. Costa, you want to
25 respond?

1 MR. COSTA: And I don't want to retry the case, your
2 Honor. I do just have a few brief responses.

3 I think if there was any question about whether
4 he was entitled to acceptance of responsibility, the position
5 they're maintaining today should end any of those notions,
6 because they're -- it's straightforward. He sold two policies
7 that did not exist. He made up the names, he forged the
8 signature of the lawyer down in the British Virgin Islands.
9 They didn't exist. He got about a million a policy, kept it,
10 gave some to his partners.

11 And they're trying to say, well, Springfield is
12 the one wanted this offshore program. No one wanted a policy
13 that didn't exist, to pay a million dollars for it. It's black
14 and white. And I think their comments are mostly irrelevant
15 but certainly reject any notion that he's accepted
16 responsibility.

17 And then I'd finally just say on the issue of
18 what's the purpose of sentencing, I mean, their interest now is
19 even challenging philosophical questions about all of this --

20 THE COURT: I feel those same concerns. I mean, I
21 know that. I wrestle with that all the time. But as I said, I
22 don't think we can have a system where if you're caught you
23 announce your regrets and then that's the end of the story. I
24 don't think that would work.

25 MR. COSTA: And, your Honor, you know, they say he can

1 work, he can pay off this money. It's been almost four years.
2 He hasn't paid off the money. He hasn't worked for the last
3 couple of years. So, why all of the sudden, is he going to be
4 able to work if he's put on probation? I'm not sure how that's
5 going to happen.

6 THE COURT: Well, nobody would hire somebody who's on
7 their way to prison. I do see he might -- his job prospects
8 would improve if he got probation. But, no, I don't think
9 there's much of a dent made on the amount that is being
10 recommended as restitution.

11 Anything further, Mr. Renteria?

12 THE PROBATION OFFICER: Nothing further, your Honor.

13 MR. COSTA: Your Honor, I did just want to make sure
14 you received the hospital's victim impact letter.

15 THE COURT: Yes. From Mr. Vela?

16 MR. COSTA: Yes.

17 THE COURT: That's -- yes.

18 Okay. We'll take a short break. No one need
19 rise.

20 *(Recess was taken from 11:27 a.m. to 11:33 a.m.)*

21 THE COURT: Okay. Anything more from anyone?

22 MR. CLARK: Judge, I think that just -- again, I don't
23 want to be redundant, but the whole issue about Smith and
24 Reagan as similarly situated individuals and that I think is a
25 properly part of the consideration under 3553 and how other

1 individuals are being assessed.

2 And, again, with all respect to him, I do think
3 that Mr. Costa is a very capable adversary.

4 THE COURT: No. This case -- I was beneficiary of
5 some excellent lawyering on both sides. I acknowledge that. I
6 wish all cases were like that.

7 MR. CLARK: Justice here is, in my mind, a question of
8 proportionality. And that's why we think the variance issue
9 is --

10 THE COURT: I am going to grant a variance. I am
11 going to grant a variance.

12 I really -- the whole issue of whom is charged in
13 any large case is always a concern to me. But that -- I mean,
14 those decisions are made way above my head; and I really can't
15 fault anyone that someone was not charged.

16 I just simply do not understand all the variables
17 that went into that decision. I mean, it may be that --

18 MR. COSTA: Your Honor, may I identify a few of them?

19 THE COURT: -- other people might have been senile,
20 other people might have been at home in convalescence, other
21 people might have been legitimately unaware of what was going
22 on. I just can't fix that at this point.

23 Yes, Mr. Costa.

24 MR. COSTA: I would just identify a few reasons for
25 the record why Mr. Swetnam and Carter were prosecuted. But

1 specifically Mr. Swetnam, he was the only one of the four who
2 received proceeds from all four fraudulent policies; and that's
3 because he was involved in all four.

4 He created the scheme. He was the one who
5 created the names and the fake cover notes for the windstorm
6 policies. Reagan had nothing to do with either one of those or
7 didn't receive any of the proceeds from either one of those.

8 And he dealt with Zurich, and he received the
9 Zurich policy and passed on the altered policy. So, both
10 factually and in terms of the money, he was the most involved.

11 Mr. Carter, we thought, was the second most
12 involved. And I accept responsibility for the fact that we
13 don't think the truth came out with regard to him.

14 Smith and Reagan only received proceeds from a
15 much -- a smaller number of the four policies and had a lot
16 less direct involvement, based on the evidence we had.

17 But the bigger picture is, you know, you sentence
18 drug defendants all the time. I guarantee you last night there
19 were hundreds of guys out on the street of Houston dealing
20 drugs --

21 THE COURT: I know.

22 MR. COSTA: -- who aren't going to see a day of
23 prison. So, just the nature of the system, unfortunately, to
24 some extent.

25 THE COURT: Yeah, I know that.

1 I do think that the prosecution has, by far, the
2 better side of the argument on each of the objections. But --
3 and the other objections, I haven't forgotten those other
4 objections that do not bear on sentencing ranges, I'm not going
5 to confront.

6 But I'm, nonetheless, going to grant the
7 objection as to the position of trust because I do think the
8 law is somewhat murky on that question. I'm -- again, I do
9 think the prosecution and Mr. Renteria have the better side of
10 the argument; but I am nonetheless going to grant that
11 objection on the basis of lenity.

12 And in terms of the variance, my concerns are
13 several. But one of my primary concerns is -- and it's part of
14 each first-time offender's case. I really do not like the
15 thought of a first-time offender, who I think we all agree is
16 not going to re-offend, getting such a hefty prison sentence.
17 I -- it seems to me that punishment ought to be incremental.
18 And somebody who's not been in trouble with the law, other than
19 immaterially, to get such a hefty sentence for the first time
20 out of the chute, that seems to me disproportionate and not
21 consistent with the goals of 18, USC, 3553.

22 In other words, I think a lesser sentence would
23 serve all the interests of justice just as well as a greater
24 sentence. So, that may be wrong; and I know it will be
25 appealed in this case. The government may well want to take

11:38 1 that up on appeal. But the fact that white collar criminals
2 can submit supportive letters and the fact that we do take them
3 out of society's productive realms really could be said of
4 every white collar defendant who's received publicity in recent
11:39 5 times. I mean, that's absolutely true of Bernie Madoff. And I
6 don't think anybody stood up asking for him to receive a
7 sentence of probation.

8 So, I'm going to depart six levels from the level
9 27 to a level 21 and impose a sentence of 37 months on each of
11:39 10 the counts of conviction, 3S, 4S, 5S; and that will be a total
11 of 37 months to run concurrently.

12 Supervised release, likewise, to run
13 concurrently, three years as to each of those counts.

14 Restitution in the amount of \$2,950,301, a
11:39 15 special assessment of \$300.

16 Voluntary surrender will be allowed.

17 While on supervised release and pursuant to
18 instructions of the probation office, defendant shall not
19 commit another crime, shall not possess a firearm, shall
11:40 20 participate in a program for treatment of drug and/or alcohol
21 addiction, shall provide probation all requested financial
22 information, and shall cooperate in a collection of a DNA
23 sample to the extent authorized by law.

24 You do have 10 days to file an appeal.

11:40 25 And you have no objection to voluntary surrender,

11:40

1 do you?

2 MR. COSTA: That's correct, your Honor.

3 I do have a couple of other issues.

4 MR. CLARK: Judge, a couple of things if I could?

11:40

5 THE COURT: Yes, sir.

6 MR. CLARK: Could you recommend, for the designation
7 of the facility, the Fort Worth facility, to be closer to --8 THE COURT: I'll do that; but they pay no attention to
9 judicial recommendation, none.

11:40

10 MR. CLARK: I appreciate that.

11 THE COURT: Okay.

12 MR. CLARK: And, secondly, because of the issue of the
13 drinking history that the probation officer has pointed out and
14 now that the Court has ordered incarceration, to the extent
15 that he is eligible for the intensive inpatient program --

11:40

16 THE COURT: I'll recommend that.

17 MR. CLARK: -- I would ask -- thank you, your Honor.

18 MR. COSTA: Two issues on our end, your Honor?

19 THE COURT: Let me hear Mr. Renteria first.

11:41

20 THE PROBATION OFFICER: Your Honor, I just want to
21 clarify the payment schedule as noted in the --22 THE COURT: It's going to be as set forth in your
23 recommendation.

24 THE PROBATION OFFICER: Thank you, Judge.

11:41

25 MR. COSTA: You mentioned the possibility of an appeal

1 or a cross appeal really, and that's -- those decisions are
2 made far above my pay grade. But for the record, given that
3 possibility, I would just note -- I think the abuse of trust,
4 we've already made our position clear.

5 On the downward variance for lack of criminal
6 history, I would just note that the government believes the
7 advisory guideline range, which had him in criminal history
8 category one, already accounts for that fact.

9 THE COURT: Okay. Thank you, very much.

10 MR. COSTA: The second issue, your Honor, we have that
11 pending motion for forfeiture, which we actually -- was filed
12 over a year ago; and we filed a renewed motion yesterday.

13 THE COURT: Is there any objection to that?

14 MR. CLARK: Your Honor, only to advise the Court there
15 is an IRS lien on his home.

16 THE COURT: Well, that doesn't affect this order,
17 though.

18 MR. WEISFELD: That doesn't, no, your Honor.

19 THE COURT: Okay. I'll sign it.

20 MR. COSTA: Thank you, your Honor.

21 That's all from the government.

22 THE COURT: This is the 9th, right?

23 MR. COSTA: Yes.

24 MR. CLARK: And we're advising the Court that there is
25 an innocent spouse involved. And I'm assuming the government

1 is not trying to forfeiture her community interest.

2 MR. COSTA: Well, the order asks for half of it. I'll
3 let Ms. Rollinson address that.

4 MS. ROLLINSON: Yes, your Honor. We're forfeiting the
5 payment of fraud payments, the \$77,526 --

6 THE COURT: You're going way too fast.

7 MS. ROLLINSON: Sorry, your Honor.

8 THE COURT: Start over again.

9 MS. ROLLINSON: We are forfeiting the payment of
10 \$77,526.91 that was made of the fraud proceeds. And there's no
11 community interest in fraud proceeds. Then, if we enforce the
12 money judgment later, then we account for the spouse's interest
13 in half of the money and the defendant's interest in the other
14 half.

15 THE COURT: Whatever the law is, it's going to work
16 that way.

17 MR. CLARK: We understand, your Honor. We understand.

18 THE COURT: Thank you all very much.

19 *(End of requested proceedings)*

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1 COURT REPORTER'S CERTIFICATION

2 I certify that the foregoing is a correct transcript from
3 the record of proceedings in the above-entitled cause.

4 Date: July 11, 2011

5
6 /s/ Cheryll K. Barron

7 Cheryll K. Barron, CSR, CMR, FCRR
8 Official Court Reporter
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